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No. 80-702

IN THE

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

The Attorney General of the State of New Mexico submits his brief in opposition to the petition of the United States of America for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App. A of Petition) is reported at 455 F. Supp. 993. The opinion of the court of appeals (App. B of Petition) is reported at 624 F.2d 111.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, except that the time for New Mexico to file its Brief in Opposition was extended to January 6, 1981 by letter from the Clerk of November 25, 1980.

STATUTES INVOLVED

The pertinent parts of New Mexico's Gross Receipts and Compensating Tax Act are set forth in Appendix D of the Petition. The sections as designated in the Appendix, and the current designation in the 1978 compilation, are:

Appendix		1978 Compilation
§§ 72-16A-3	–	§§ 7-9-3
72-16A-4	–	7-9-4
72-16A-7	–	7-9-7
72-16A-12	–	7-9-12
§§ 72-16A-12.1	–	§§ 7-9-13
72-16A-12.2	–	7-9-14
72-16A-14	–	7-9-45
72-16A-14.9	–	7-9-54

41 U.S.C. § 255, 31 C.F.R. Part 205 (1979), and § 4(c) (2) of the Atomic Energy Act of 1946, 60 Stat. 755, are reproduced as Appendices A, B, and C, respectively, attached to this brief.

QUESTIONS PRESENTED

1. Whether three private corporate contractors performing contracts for the United States Department of Energy ("DOE"), successor to the Energy Research and Development Administration ("ERDA"), are exempt from the New Mexico gross receipts and compensating taxes (§§ 7-9-1 through 7-9-81, NMSA 1978) on the funds utilized by them to pay salaries, operating costs, award fees and third-party suppliers.

2. Whether reliance by three private corporate contractors on an "advanced funding" arrangement pursuant to 41 U.S.C. § 255, § 4(c) (2) of the Atomic Energy Act of 1946, 60 Stat. 755, now codified at 42 U.S.C. § 2061(b), and 31 C.F.R. Part 205 (1979) to finance their performance of contract work for the Department of Energy renders such contractors federal agents exempt from the New Mexico gross receipts tax on such funds.

3. Whether, in the absence of congressional authorization, Department of Energy contracting officers may insert agency-creating clauses in contracts with three private corporate contractors to insulate them from the New Mexico gross receipts and compensating taxes.

STATEMENT OF THE CASE

1. The United States instituted the present declaratory judgment action in 1975 to determine the liability for the New Mexico gross receipts and compensating taxes* of three private corporate contractors working for the Atomic Energy Commission ("AEC"), whose responsibilities were first shifted to the Energy Research and Development Administration ("ERDA"), and then to the Department of Energy ("DOE").** A companion case, holding Army contractors liable for these same taxes, was not appealed beyond the Tenth Circuit, *United States v. New Mexico*, 581 F.2d 803 (10th Cir. 1978). While New Mexico had viewed AEC contractors as exempt from the Emergency School Tax Act, predecessor to the gross receipts tax, it reversed its position in 1967 when the Gross Receipts and Compensating Tax Act was enacted, placing the United States on notice from then on. See *United States v. Bureau of Revenue*, 87 N.M. 164, 531 P.2d 212 (Ct. App. 1975) (Petition, App. B, 12a, n.3).

Atomic Energy Commission contractors as a class were once immune from state taxes, *Carson v. Roane-Anderson Company*, 342 U.S. 232 (1952), an immunity subsequently withdrawn by Congress through amendment of the Atomic Energy Act to place them on the same footing as contractors of other agencies. Act of August 13, 1953, 67 Stat. 575 (Petition, App. B, 15a, 21a).

The New Mexico gross receipts tax is levied on gross receipts from selling property or performing services within the state (Petition, App. D, 31a). The compensating tax is levied on the value of property imported into the state, complementing the gross receipts tax on in-state transactions (Petition, App. D, 32a).

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* Sections 72-16A-1 through 72-16A-19 (Supp. 1975); now codified as §§ 7-9-1 through 7-9-81, NMSA 1978.

** All three abbreviations are used interchangably herein, depending on the context.

The imposition of the gross receipts tax, as its name suggests, is not dependent on a taxpayer showing a profit (Petition, App. B, 18a, n.6).

The New Mexico taxes are routinely levied on the receipts of federal contractors, *United States v. New Mexico*, 581 F.2d 803 (10th Cir. 1978). For analytical purposes, these receipts may be divided into three categories: the salaries of contractor personnel and internal operating expenses, the cost of supplies purchased from third parties and, where applicable, a contractor's stipulated fee (Petition, App. B, 24a, n.11). A vendor of supplies to a contractor is also potentially subject to tax on his receipts, although non-taxable transaction certificates are provided for many such transactions to avoid pyramiding of tax, § 7-9-47, NMSA 1978 (Supp. 1980).

The United States' sole contention is that the three DOE contractors are federal agents in disbursing funds to their employees and suppliers and fee payments to themselves (Petition, App. B, 12a). It is asserted that the funds utilized by the contractors are therefore exempt from the New Mexico taxes either because the funds belong to the contractors' principal, the United States, or because the legal incidence of the New Mexico taxes would impermissibly fall on the United States through its agents. Similarly, vendors of supplies to the agent-contractors would also be entitled to a deduction on their receipts, § 7-9-54, NMSA 1978 (Supp. 1980).

If the contractors are not agents, they would be liable for gross receipts tax on the funds they receive to cover salaries and operating costs, purchased supplies and their own fees. Their liability for the compensating tax would also follow (Petition, App. B, 11a, n.1).

2. The three contractors are Sandia Corporation, a subsidiary of Western Electric Company, Inc.; the Zia Company, a subsidiary of Santa Fe Industries, Inc.; and Los Alamos Constructors, Inc. (LACI), a subsidiary of the Zia Company. Their tasks and

property ownership are adequately set forth in the Petition at page 2, with the addition that Zia and LACI concede their liability for gross receipts tax on their fixed fees (Petition, App. B, 24a, n.11).

The three contractors operate under "standard Atomic Energy Commission (now DOE) management contracts" (Petition, 2). Thus, the three contractors perform their work at a federal facility, require approval by the United States of purchases above specified amounts, are subject to general supervision by United States personnel, furnish virtually none of their own property, cause title to their purchases to pass from the vendor directly to the United States and are essentially protected from loss in contract performance since all their costs are compensated by the United States (Petition, App. B, 14a, 19a-21a, 25a, n.12).

Like many ERDA contractors, the three contractors are financed through an "advanced funding" arrangement which relieves them of the need to borrow capital (Petition, App. B, 24a). This arrangement is adequately described in the Petition at page 3 with the additions that advanced funding is prescribed for general use in government contracting in 41 U.S.C. § 255 and 31 C.F.R. Part 205 (1979) and for AEC contractors specifically in § 4(c) (2) of the Atomic Energy Act of 1946, see Appendices A, B, and C, attached to this brief. Also, the contractors draw on advanced funds, among other things, to make salary payments to their employees and fee payments to themselves (Petition, App. B, 21a).

The United States concedes that the privately-owned contractors are not federal instrumentalities* (Petition, App. B, 21a). The United States concedes that the contractors are not federal agents in "directing the details of day-to-day research or

* The Atomic Energy Act defines "Government agency" as an "independent establishment" or "corporation" which is "wholly or partly owned by the United States of America" and which is also "an instrumentality of the United States. . .", 42 U.S.C. § 2014(1) (Petition, App. B, 21a).

maintenance and the hiring and direct supervision of employees" (Petition, App. B, 18a, n.6). The United States concedes that the contractors' employees are not employees of the United States, that the contractors' employees may make no claims directly against the United States, and that the United States is not liable for contractor torts (Petition, App. B, 18a, n.6).

The contractors are required to make purchases and subcontracts in their own names. Their purchase forms clearly distinguish between the "Buyer" – Sandia, Zia or LACI – and the "Government" (Petition, App. B, 26a, n.6).

More than 8,000 contractors with other agencies are financed through "advanced funding", as contrasted with only 165 within ERDA (Petition, App. B, 24a, n.10). No claim of agency relationship could seriously be made for many of the non-ERDA recipients even though they are financed exactly as are the ERDA contractors (Petition, App. B, 23a). Even within ERDA, advanced funding was adopted as simply another means of reimbursing contractors and eliminating weaknesses in the government's bookkeeping practices (Petition, App. B, 23a, 24a).

Sandia receives no fee under its ERDA contract. However, its profit-conscious parent company receives royalty-free licenses on communication-related patents developed by Sandia. The United States pays Sandia's overhead and the salaries of parent-company employees used in the course of Sandia operations. Sandia's parent is also paid by the United States for furnishing a variety of auditing, research and supervisory services. ERDA regulations concerning fee determinations do not evidence any intent to create an agency relationship by omitting a fee (Petition, 24a, n.12; 25a).

Two years into this litigation, the local ERDA contracting officers in New Mexico modified the three contracts to refer directly to the three contractors as agents. The modifications contain the following caveat:

> This article shall not be construed to modify any other provisions of the contract . . . nor shall it create rights or obligations not otherwise provided for in the contract. (Petition, App. B, 26a).

3. On cross motions for summary judgment, the District Court found for the United States (Petition, App. A). Relying on *Livingston v. United States,* 179 F. Supp. 9 (E.D.S.C. 1959), *aff'd per curiam,* 364 U.S. 281 (1960), it held that the contracts and factual circumstances – most importantly the use of advanced funding – indicated an agency relationship (Petition, App. A, 4a, 6a). The advanced funding significantly distinguished these contractors from typical cost-plus contractors, and use of the funds did not constitute receipt of reimbursements for contractor expenses (Petition, App. A, 5a). If the contractors were agents in procuring supplies, they must also be agents in disbursing funds to their employees and themselves for salaries and operational costs (Petition, App. A, 9a).

On appeal, the Court of Appeals for the Tenth Circuit reversed (Petition, App. B). While recognizing that "a federal agency may bring a contractor within the scope of intergovernmental immunity . . ." (Petition, App. B, 17a), it declined to find that the use of advanced funding created an agency relationship. Since the "contractors are separate entities solely responsible for their own employees and internal management . . .", it follows that payments for salaries and overhead meet the contractors' "own obligations . . . regardless of the funding device employed" (Petition, App. B, 18a, 19a). The widespread use of advance funding to finance obvious non-agents outside ERDA (Petition, App. B, 23a, 24a), and the equally widespread use within ERDA, indicated that some additional "special arrangement" would be needed to create agency relationships (Petition, App. B, 21a).

The court relied on *United States v. Boyd,* 378 U.S. 39 (1964), because "all the same factors present here" were

advanced in that case in unsuccessfully claiming an agency relationship (Petition, App. B, 20a). While acknowledging that a use tax, rather than a sales tax, was at issue in *Boyd*, the court observed that "using government property in the course of performing a government contract is not unlike incurring obligations to achieve the same end" (Petition, App. B, 20a, n.7).

The court held that Sandia's no-fee arrangement did not bring it within the tax-exempt ambit of *Livingston v. United States*, 179 F. Supp. 9, (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960), because Sandia and its parent company derived demonstrable monetary and business benefits from contract performance, unlike du Pont in the earlier case (Petition, App. B, 25a, n.12).

The contract amendments adding carefully qualified agency language were discounted by the court because "By their terms, . . . the amendments add nothing substantive to the contracts . . ." (Petition, App. B, 25a). Since "the provisions of the contracts before the amendments did not establish agency status, we need not be swayed by amendments which make no changes" (Petition, App. B, 26a). Furthermore, the new language was not added to the contractors' purchase forms which continued to distinguish between the "Buyer" and the "Government" (Petition, App. B, 26a).

REASONS FOR DENYING THE PETITION

1. The United States alleges a conflict between the decision of the Tenth Circuit and *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954); *Livingston v. United States*, 179 F. Supp. 9 (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960); *United States v. Boyd*, 211 Tenn. 139, 363 S.W. 2d 193 (1962), *aff'd*, 378 U.S. 39 (1964); and *United States v. Nevada Tax Commis-*

sion, 291 F. Supp. 530 (D. Nev. 1968), *aff'd*, 439 F.2d 435 (9th Cir. 1971) (Petition, 7).*

In fact, the present decision neither conflicts with the cited cases nor departs from the "uniform national rule" (Petition, 8) concerning state tax treatment of federal contractors. The decision of the Tenth Circuit reflects scrupulous adherence to the precedents of this Court and decisions of other courts of appeal. It properly applies them to the particular taxes at issue and the extensive factual development and numerous concessions in the present case.

In *James v. Dravo Contracting Company*, 302 U.S. 134 (1937) and *Alabama v. King & Boozer*, 314 U.S. 1 (1941), this Court established the general rule that federal contractors are subject to non-discriminatory state taxes. The fact that the economic burden of a tax might be passed on to the United States pursuant to contract would not bar its application.

The most obvious exception to this rule occurs where the legal incidence of a state tax falls on the United States. In recent years, the major concentration of this Court in adjusting federal-state relations in the area of tax has been to determine the legal incidence of particular states' taxes. See *United States v. County of Fresno*, 429 U.S. 452 (1977); *Diamond National Corporation v. State Board of Equalization*, 425 U.S. 268 (1976);

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* The cited decisions deal only with the imposition of sales taxes on *purchases* by federal contractors. To the extent the present decision applies the New Mexico gross receipts tax to funds utilized by the contractors to pay salaries and internal operating costs (some 58% of their expenditures), there is no conflict with the cited decisions since they did not address this issue in any way. As the Tenth Circuit observed, given the concession that the contractors' employees were their own, payment of salaries and internal costs clearly satisfied obligations of the contractors, not of the United States (Petition, App. B, 18a-19a). Furthermore, to the extent many states' tax structures do not tax receipts related to such expenditures, this case will not have the far-ranging impact claimed by the United States (Petition, 7).

United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975); *Gurley v. Rhoden*, 421 U.S. 200 (1975); and *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968).

The present Petition affords no opportunity to reexamine or expand the doctrines enunciated in these cases. The United States raises no claim that the New Mexico taxes by their terms fall on the United States. Indeed, a companion case involving the same parties has already determined the opposite and was not appealed beyond the Tenth Circuit, *United States v. New Mexico*, 581 F.2d 803 (10th Cir. 1978).

Instead, the United States claims that the New Mexico taxes fall on the United States by virtue of contractual clauses which create agency relationships with its contractors. Consideration of this claim will of course have no relevance in states whose tax structures already place legal incidence on the United States statutorily, effectively exempting its contractors from those states' taxes.

But even the claims of agency are shopworn. *United States v. Boyd*, 378 U.S. 39 (1964) has already determined that AEC contractors are neither agents nor instrumentalities by virtue of general contract provisions and funding arrangements, albeit in regard to a use tax, not a gross receipts tax. The United States is simply trying to "shoe horn" the facts of this case into one of several established, and clearly inapposite, exceptions to the general taxability of federal contractors. No new ground will be broken if certiorari is granted.

2. In *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), this Court recognized the power of the executive branch to insulate its contractors from state taxes by explicitly designating them in all pertinent documents as procurement agents with

authority to pledge the credit of the United States.* The United States alleges a conflict between the *Kern-Limerick* holding and the present decision (Petition, 9-11). In fact, the decision of the Tenth Circuit accords a thoughtfully orthodox deference to the *Kern-Limerick* holding:

> . . . under *Kern-Limerick* a federal agency may bring a contractor within the scope of intergovernmental immunity if a decision to create an agency relationship is made in advance of a dispute and is unequivocably expressed in all relevant documents.
> (Petition, App. B, 17a).

The Tenth Circuit for good reason refused to accord any weight to certain contract modifications which referred directly to the contractors as agents (Petition, App. B, 25a). This refusal was based, first, on the fact that the modifications themselves contained crucial qualifiers: they did not "modify any other provisions of the contract" nor "create rights or obligations not otherwise provided for in the contract" (Petition, App. B, 26(a). Clearly, the modifications were a classic case of doublespeak. Since "the provisions of the contracts before the amendments did not establish agency status", the court was not swayed "by amendments which make no changes" (Petition, App. B, 26a).

Second, the modifications were inserted by low-level ERDA officials two years after this tax case commenced (Petition, App. B, 25a) and purported to be retrospective in application (Petition, App. A, 6a). Third, the contractors' purchase orders were not modified and continued to distinguish between the "Buyer" – Sandia, Zia or LACI – and the "Government" (Petition, App. B, 26a). Finally, although not stressed by the Tenth Circuit in the context of the modifications, the United States continued

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* Interestingly, at least one major federal agency, the Department of Defense, has as a matter of policy declined to exercise this power, refusing to insert "agency-creating clauses to avoid state and local taxes otherwise payable by its contractors", *United States v. New Mexico*, 581 F.2d 803, 808, n.1 (10th Cir. 1978).

to concede that these contractors were not federal instrumentalities, were not federal agents in day-to-day operations and were separate entities with their own employees (Petition, App. B, 18a, n.6; 21a).

The *Kern-Limerick* decision accorded to the executive branch a power equal to that of Congress in insulating federal contractors. It does not require the time of this Court to determine that the purported exercise of that power here was transparent and inadequate, falling far short of the *Kern-Limerick* requirements.

The United States further claims that the Tenth Circuit departed from *Kern-Limerick* in failing to read an agency relationship into the contractors' reliance on advanced funding (Petition, 9-11). It is the United States' position which conflicts with *Kern-Limerick*. A comparison of *Kern-Limerick* with the virtually identical facts in *Alabama v. King & Boozer*, supra, evidences this Court's refusal to "read between the lines" and divine an agency relationship from standard government contract clauses which stop short of explicit agency creation.

Directly on point, in *United States v. Boyd*, 378 U.S. 39 (1964), AEC management contractors were held to be neither federal instrumentalities nor agents exempt from the Tennessee use tax, although they relied on "Government funds" for all their costs (the same advanced funding put forward here), operated within an AEC facility, passed title to their purchases directly to the United States, secured advance approval of purchases from the United States, and were supervised and controlled by the United States, at 41-42, 46, 48.* The Court characterized the contractors as "cost-plus-fixed-fee" contractors despite their reliance on advanced funds, noted that their limited risk was a common characteristic of government contract-

* The United States' claim that a use tax is distinct from a gross receipts tax (Petition, 12, n.1) misses the point. Regardless of the *measure* of the Tennessee tax it would ultimately be *paid* from the same source as the New Mexico gross receipts tax, namely, the contractors' advanced funds accounts. If the Tennessee contractors were federal agents in disbursing

Cont. on p. 13

ing and observed that if the government wanted to utilize tax-exempt servants or its own employees, "it is well aware that it may do so and familiar with the ways of doing it", 378 U.S. at 46, 48.

As in *Boyd*, this Court is asked to read an agency relationship into "standard Atomic Energy Commission (now DOE) management contracts" (Petition, 2). The United States' claim that the contractors are agents in disbursing funds is negated by its concession that they are not agents for day-to-day operations (Petition, App. B, 12a, 18a, n.6). It is sophistry to claim the contractors are not agents when they *do* their work but are agents when they get *paid* for it. If these three contractors are agents by virtue of advanced funding, then so are the other 163 ERDA contractors similarly financed (Petition, App. B, n.10). This would frustrate the congressional intent in amending the Atomic Energy Act to "place Atomic Energy Commission contractors on the same footing as other contractors performing work for the Government", *United States v. Boyd*, 378 U.S. 39, 40 (1964). Furthermore, if these three contractors are agents, then so are the 8,000 contractors receiving advanced funding from other agencies, many of whom are elements of state and local government, 31 C.F.R. § 205.3(a) (1979) (Petition, App. B, 23a, 24a, n.10). The absurdity of this result mandates its rejection out of hand.

3. The United States alleges a conflict between the present decision and the decision of the Tennessee Supreme Court in the sales tax portion of *United States v. Boyd* which was not appealed to this Court, 211 Tenn. 139, 363 S.W.2d 193 (1962) (Petition, 12). In finding the contractors to be tax-exempt

Cont. from p. 12

from these accounts, the very claim made here (Petition, 10), the incidence of that tax would impermissibly fall on the United States through its agent. In finding the contractors in *Boyd* to be taxable, this Court implicitly rejected the notion that they functioned as disbursement agents in meeting their obligations with advanced funds.

procurement agents, the Tennessee Supreme Court found compliance with *Kern-Limerick, Inc. v. Scurlock* although the contractors were not designated as "purchasing agents", 363 S.W.2d at 200. This is hardly surprising since the contractors' purchase orders stated that they were placed "for and on behalf of the Government" and that "nothing herein shall preclude liability of the Government for any payment properly due hereunder", 363 S.W.2d at 199. These explicit authorizations to pledge the credit of the United States contrast sharply with the present case in which standard advanced funding arrangements are claimed to prove agency. There is no conflict in the law applied in the two cases, only a radical difference in the critical facts.

4. The United States alleges a conflict between the present decision and the decision of the Ninth Circuit in *United States v. Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971), *aff'g* 291 F. Supp. 530 (1968). While the quote from the district court opinion at page 13 of the Petition is accurate, *that finding was not appealed to the Ninth Circuit.* All that was appealed was the *statutory* legal incidence of the Nevada tax in the wake of the recently decided *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968). The Ninth Circuit's treatment of the merits is confined to two short paragraphs, 439 F.2d at 441, which clearly state that only the statutorily-determined legal incidence was an issue on appeal. Indeed, the determination that the United States was the purchaser was *stipulated* by the parties on appeal, 439 F.2d at 439!

The Nevada district court opinion is devoid of the factual development here concerning the widespread use of advanced funds as well as the concessions that the contractors are neither instrumentalities nor day-to-day agents. In any event, a conflict between the Nevada district court and the Tenth Circuit is not a ground for granting certiorari, Supreme Court Rule 19; Stern and Gressman, *Supreme Court Practice* (4th ed. 1969), 161-162.

5. The United States claims a conflict between the present decision and *Livingston v. United States*, 179 F. Supp. 9 (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960). The alleged conflict concerns the disparate tax treatment of du Pont which received a $1 fee and Sandia which receives no fee (Petition, 11). In fact, there is no conflict.

Following *United States v. Boyd*, 378 U.S. 39 (1964), the significance of the *Livingston* opinion was reduced to "the 'extraordinary' contractual relationship between du Pont and AEC at this plant. . ." and the "factual determination that du Pont received no benefits from the contract", 378 U.S. at 45, n.6. In the instant case, the record discloses significant monetary and business benefits to Sandia and its profit-making parent from undertaking this contract (Petition, App. B, 25a, n.12). Furthermore, the contracts here are concededly "standard" (Petition, 2) and not "extraordinary". Finally, ERDA's regulations reveal that a contractor's fee is now a matter of negotiation, having nothing to do with the contractor's "high sense of public responsibility", *Livingston, supra*, at 23. (Petition, App. B, 25a). In summary, there is no conflict of law between *Livingston* and the present case, but only significant factual differences.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January, 1981

APPENDIX A – 41 U.S.C. §255

Advance or other payments; restrictions; conditions

(a) Any executive agency may–

(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) of this section may not exceed the unpaid contract price.

(c) Advance payments under subsection (a) of this section may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens.

APPENDIX B – 31 C.F.R. Part 205 (1979)

WITHDRAWAL OF CASH FROM THE TREASURY FOR ADVANCES UNDER FEDERAL GRANT AND OTHER PROGRAMS

§ 205.1 Purpose.

This part prescribes the regulations governing advances to recipient organizations for financing operations under Federal grant and other programs.

§ 205.2 Scope of regulations.

(a) The regulations in this part apply to any Federal program requiring advances to finance the recipient organization's activities in carrying out the program, whether by contract, grant, contribution, or other form of agreement. (Advance payments on procurement contracts are also subject to the provisions of the Federal Procurement Regulations regarding contract financing which appear at 41 CFR 1-30 and the provisions of the Armed Services Procurement Regulations regarding defense contracting which appear at 32 CFR 163.) The regulations in this part are not generally applicable to loan programs. However, the letter-of-credit method should be considered by Federal program agencies for application to loans carrying interest rates which are lower than Treasury borrowing rates.

(b) These regulations are not intended to apply to Government disbursements made to reimburse an organization for work already performed and financed with the organization's own working capital. However, these regulations do apply to reimbursable grant programs involving nonprofit organizations participating in the single letter-of-credit funding technique. Any other specific application of features of these regulations to reimbursement payments will be considered by the Department of the Treasury if requested by a Federal program agency.

§ 205.3 Definitions.

For the purpose of this part:

(a) *Recipient organization* means an organization outside the Federal Government (including any State and local government, educational institution, international organization and any other public and private organization) receiving cash advances under Federal grant and other programs.

(b) *Primary recipient organization* means a recipient organization receiving cash advances directly from the Federal Government.

(c) *Secondary recipient organization* means a recipient organization receiving cash advances from a primary recipient organization.

(d) *Direct Treasury check* means the method whereby payment is made directly to a recipient organization by Treasury check authorized by the responsible officer of the Federal program agency.

(e) *Letter of Credit–Treasury Regional Disbursing Office System* means the system whereby the letters of credit are maintained and serviced by Treasury disbursing centers and Treasury regional disbursing offices.

(f) *Letter of Credit–Federal Reserve Bank System* means the system whereby the letters of credit are maintained and serviced by Federal Reserve banks and branches.

(g) *Checks paid technique* means the procedure whereby the drawdown on the letter of credit is delayed until the checks issued for program disbursements are presented to the recipient organization's bank for payment.

(h) *Delay of drawdown technique* means the procedure whereby the drawdown on the letter of credit is delayed until after checks issued for program disbursements have been forwarded to the payees.

(i) *Consolidation of funding to the same recipient organization under one letter of credit* means the procedure whereby, within a single accounting entity, the Federal program agency combines all advance funding to the same recipient organization

under one letter of credit. It [sic] achieving this objective, the Federal program agency shall include all advance funding to the recipient organization including that which ordinarily would not qualify because it does not meet the criteria established for the letter-of-credit method.

(j) *Single letter-of-credit technique* means the procedure whereby numerous letters of credit issued by different accounting entities within the same Federal department to State agencies, local government agencies, or recipient institutions are replaced by one centrally administered single letter of credit issued to one central organization within that State, local government, or recipient institution.

(k) *Working capital advance basis* means the procedure whereby funds are advanced to the recipient organization to cover its estimated disbursement needs for a given initial period. Thereafter, the recipient organization would be reimbursed for the amount of its actual cash disbursements. The amount of the initial advance shall be geared to the reimbursement cycle so that after the initial period the payments are approximately equal to the average amount of the recipient organization's unreimbursed program payments.

§ 205.4 General regulations.

(a) Cash advances to a recipient organization shall be limited to the minimum amounts needed and shall be timed to be in accord only with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program costs and the proportionate share of any allowable indirect costs.

(b) If a Federal program agency has, or expects to have, a continuing relationship with a recipient organization for at least one year, involving annual advances aggregating at least $120,000,

the agency shall use the letter-of-credit method. Letters of credit will be established with the Treasury disbursing centers and Treasury regional disbursing offices (Letter of Credit–Treasury Regional Disbursing Office System) or the Federal Reserve banks and branches (Letter of Credit–Federal Reserve Bank System) as determined by the Commissioner, Bureau of Government Financial Operations, or his designee.

(c) When annual advances to a recipient organization aggregate less than $120,000 or there is not a continuing relationship for at least one year, the cash advances shall ordinarily be made by the direct Treasury check method. Such cash advances shall be made only in amounts necessary to meet current disbursement needs and shall be scheduled so that the funds are available to the recipient organization only immediately prior to their disbursement by the organization.

(d) Each Federal program agency shall work toward the objective of the consolidation of funding to the same recipient organization under one letter of credit. Also, the single letter-of-credit, checks paid, and the delay of drawdown techniques of withdrawing funds under the letter-of-credit method shall be employed wherever feasible under the direction and approval of the Department of the Treasury.

(e) Cash advances made by primary recipient organizations to secondary recipient organizations shall conform substantially to the same standards of timing and amount as apply to cash advances by Federal program agencies to primary recipient organizations. Federal program agencies shall require primary recipient organizations to develop procedures whereby secondary recipient organizations can obtain funds from the primary recipient organization as needed for disbursement.

§ 205.5 Irrevocability of the letter of credit.

A letter of credit is irrevocable (the equivalent of cash available to the recipient organization) to the extent the recipient organization has obligated funds in good faith thereunder in

executing the authorized Federal program in accordance with the grant, contract, or other agreement.

§ 205.6 Contract or grant provisions.

Use of letters of credit shall be covered by a clause in the grant, contract, or other financing agreement whereby the recipient organization commits itself to (a) initiating cash drawdowns only when actually needed for its disbursements, (b) timely reporting of cash disbursements and balances as required by the Federal program agency, and (c) the imposition of the same standards of timing and amount upon any secondary recipient organizations including the furnishing of reports of cash disbursements and balances, with the understanding that failure to adhere to these provisions may cause the unobligated portion of the letter of credit to be revoked by the Federal program agency or by the Department of the Treasury. The financial management system of the recipient organization shall provide for effective control over and accountability for all Federal funds as stated in OMB Circular A-102 revised for State and local governments and OMB Circular A-110 for institutions of higher education, hospitals, and other nonprofit organizations.

§ 205.7 Termination of advance methods of financing grant programs.

When a recipient organization receiving cash advances by a letter of credit or by direct Treasury check method has demonstrated to a Federal program agency an unwillingness or inability to establish procedures that will minimize the time elapsing between cash advances and the disbursement thereof, the Federal program agency, unless prohibited by the statutes governing the programs(s) in question, shall terminate advance financing and shall require the recipient organization to finance its operations with its own working capital, and payments to the recipient organization shall be made by direct Treasury check method to reimburse it for actual cash disbursements. In those cases in which the reimbursement method is not feasible,

arrangements may be made whereby the operations of the recipient organization are financed on a working capital advance basis.

§ 205.8 Responsibilities of Federal program agencies.

Regardless of the particular method used to advance funds, the Federal program agency shall be responsible for (a) making such reviews of the financial practices of recipient organizations, both primary and secondary, as are necessary to insure that the provisions of this part are being complied with, and (b) instituting such remedial measures as may be necessary in the event that a recipient organization demonstrates its unwillingness or inability to comply with these provisions. Federal program agencies shall formulate procedural instructions which specify the methods employed to carry out these responsibilities and shall forward copies of such instructions to the Commissioner, Bureau of Government Financial Operations, or his designee for approval. Also, each Federal program agency shall furnish the Department of the Treasury such periodic reports showing cash balances in the hands of the recipient organizations and results of reviews of the financial practices of recipient organizations as are required by the Commissioner, Bureau of Government Financial Operations, or his designee.

§ 205.9 Implementing instructions.

The Commissioner, Bureau of Government Financial Operations, will issue implementing instructions for the regulations established by this part in Volume I of the Treasury Fiscal Requirements Manual.

§ 205.10 Waivers.

Any waivers of the provisions of this part previously granted to Federal program agencies are hereby revoked. Requests for waivers of specific provisions of this part shall be presented in writing to the Commissioner, Bureau of Government Financial Operations, or his designee.

APPENDIX C – Section 4(c)(2) of the Atomic Energy Act of 1946, 60 Stat. 755, now codified at 42 U.S.C. § 2061(b)

OPERATION OF THE COMMISSION'S PRODUCTION FACILITIES.– The Commission is authorized and directed to produce or to provide for the production of fissionable material in its own facilities. To the extent deemed necessary, the Commission is authorized to make, or to continue in effect, contracts with persons obligating them to produce fissionable material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce fissionable material in facilities owned by the Commission to the extent that the production of such fissionable material may be incident to the conduct of research and development activities under such contracts. Any contract entered into under this section shall contain provisions (A) prohibiting the contractor with the Commission from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission, and (B) obligating the contractor to make such reports to the Commission as it may deem appropriate with respect to his activities under the contract, to submit to frequent inspection by employees of the Commission of all such activities, and to comply with all safety and security regulations which may be prescribed by the Commission. Any contract made under the provisions of this paragraph may be made without regard to the provisions of section 3709 of the Revised Statutes (U.S.C., title 41, sec. 5) upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing that advertising is not reasonably practicable, and partial and advance payments may be made under such contracts. The President shall determine at least once each year the quantities of fissionable material to be produced under this paragraph.